

July 27 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0156

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KAREN DANIEL-KNOLL,

Defendant and Appellant.

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

MOTION TO DISMISS

The State of Montana moves to dismiss this appeal because the Appellant, Karen Daniel-Knoll, did not file a timely notice of appeal from the district court's Judgment and Commitment of February 24, 2009.

BACKGROUND

Daniel-Knoll was charged by Information in Lewis & Clark County with Issuing Bad Checks (felony common scheme) in July 2006. (Information, D.C. Doc. 2.) The State alleged that Daniel-Knoll opened up a \$50 account and then wrote \$2600 in bad checks. (Justice Court Affidavit of Probable Cause, D.C. Doc. 1.)

Daniel-Knoll was convicted following entry of a guilty plea in district court, Judge Honzel presiding. (Judgment And Commitment, D.C. Doc. 38 at 1, attached as Ex. 1.) Daniel-Knoll was represented by Jeremy Gersovitz of the Office of the

State Public Defender (OSPD) in connection with her guilty plea. (Ex. 1 at 1; Acknowledgement Of Waiver Of Rights By Guilty Plea, D.C. Doc. 8.)

Daniel-Knoll has several convictions for writing bad checks dating back to 1988. (Presentence Investigation Report at 2, D.C. Doc. 13.) She was represented at sentencing by Bryan Norcross of the OSPD. (Notice of Substitution of Counsel, D.C. Doc. 33.) The sentencing court, Judge Seeley presiding, committed Daniel-Knoll to the Department of Corrections (DOC) for a period of 10 years, with 7 years suspended. (Ex. 1 at 2.)

The district court's sentencing judgment was entered on February 24, 2009. In October 2009, well after the time for appeal had passed, Daniel-Knoll filed a Motion To Correct Illegal Sentence. (D.C. Doc. 41.) The court denied Daniel-Knoll's motion on January 26, 2010. (D.C. Doc. 48, attached as Ex. 2.) Daniel-Knoll also received a concurrent, fully-suspended DOC commitment for Bail Jumping. (Ex. 2 at 1.) Judge Seeley concluded that Daniel-Knoll's motion to correct her sentence was without merit and that Daniel-Knoll had failed to file a properly verified petition for postconviction relief. (Ex. 2 at 1-2.)

Daniel-Knoll filed a notice of appeal on March 29, 2010, more than one year following the district court's February 2009 Sentencing Judgment and 62 days after entry of the court's order denying Daniel-Knoll's motion to correct her sentence. (Notice of Appeal, attached as Ex. 3.)

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE NOTICE OF APPEAL WAS FILED OVER ONE YEAR AFTER DANIEL-KNOLL WAS SENTENCED AND MORE THAN 60 DAYS AFTER THE DISTRICT COURT'S DENIAL OF DANIEL-KNOLL'S MOTION TO CORRECT HER SENTENCE.

“An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.” Mont. Code Ann. § 46-20-104(1). In order to appeal a post-judgment order, however, the defendant must file a timely appeal from the district court’s final judgment of conviction, which occurs at the time of sentencing, here in February 2009. In a criminal case, the defendant must appeal within 60 days. Rule 5(b)(i), M. R. App. P. When a timely appeal is filed, this court reviews “any order, ruling, or proceeding of the trial court against the convicted person affecting the convicted person’s substantial rights *on the appeal of the cause*[.]” Mont. Code Ann. § 46-20-701 (emphasis added).

Daniel-Knoll’s brief challenges the sufficiency of the evidence. She also alleges that Mr. Gersovitz was guilty of ineffective assistance of counsel because he allegedly failed to bring an email and agreement between Daniel-Knoll and the bank to the attention of the trial court. (Appellant’s Br. at 6.) Apart from the fact that she waived these claims when she entered her guilty plea, Daniel-Knoll cannot use an untimely motion to correct her sentence as a way to get around the appeal deadline. To challenge her conviction and sentence, as she does here, Daniel-

Knoll needed to file a timely notice of appeal from the court's February 2009 sentencing judgment. She did not do so. Moreover, assuming for purposes of argument only that the court's subsequent order denying Daniel-Knoll's motion to correct her sentence was appealable and reviewable, Daniel-Knoll's notice of appeal was filed 62 days after entry of the order, or 2 days late.

Accordingly, this appeal must be dismissed. As this Court reiterated in its Order in Normandy v. State, DA 09-0622 (attached for Daniel-Knoll's benefit as Ex. 4), whether the 60-day time requirement is viewed as jurisdictional or as a categorical time prescription, absent an order granting an out-of-time appeal, the untimely filing of the notice of appeal requires dismissal. State v. Clark, 2008 MT 317, ¶¶ 19-32, 346 Mont. 80, 193 P.3d 934 (Nelson and Morris, JJ, concurring).

As a final aside, the State views a motion to dismiss following receipt of the Appellant's opening brief as satisfying the State's obligation under Normandy to "notify this Court at the earliest point in time the State learns that an appeal is not timely filed, and to promptly move to dismiss." The Attorney General's Office assigns cases after the opening brief arrives. We do not have sufficient paralegal support staff to review every unassigned file prior to receipt of the opening brief. Further, the vast majority of appeals are timely; it is the appellant's obligation to notify this Court that an appeal is untimely by filing a motion for an out-of-time appeal; appeals are occasionally dismissed by the appellant before an opening brief is filed; and, as the procedural history of this case illustrates, it is conceivable that

this Court could treat a brief filed in the context of an untimely appeal as warranting habeas relief under Lott v. State, 2006 MT 279, 334 Mont. 270, 150 P.3d 337. If this Court disagrees, however, the State will develop a procedure for screening cases following transmittal of the district court record.

CONCLUSION

This appeal would be untimely even if Daniel-Knoll had filed her appeal from Judge Seeley's post-judgment order within 60 days. It is evident that Daniel-Knoll's appeal from the January 2006 order is an attempt to circumvent the appeal time bar because in her opening brief she attacks her conviction rather than her sentence.

However, even if Judge Seeley's post-judgment order were appealable and reviewable, Daniel-Knoll's appeal--filed more than one year after sentencing--was filed 2 days late.

Accordingly, this appeal must be dismissed.

Respectfully submitted this 27th day of July, 2010.

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By: Mark W. Mattioli

MARK W. MATTIOLI
Appellate Services Bureau Chief

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing
Motion to Dismiss to be mailed to:

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DATED: July 27, 2010



CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that this response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, excluding certificate of service and certificate of compliance.



MARK W. MATTIOLI

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APPENDIX

Judgment And Commitment, D.C. Doc. 38.....Ex. 1

Order on Defendant's Motion to Correct Illegal Sentence, D.C. Doc. 48 ...Ex. 2

Notice of AppealEx. 3

Order in Normandy v. State, DA 09-0622.....Ex. 4